

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BLOOMINGDALE'S, INC.

and

Case 31-CA-071281

FATEMEH JOHNMOHAMMADI

BLOOMINGDALE'S, INC.'S
MOTION FOR RECONSIDERATION OF BOARD'S ORDER
DENYING MOTION TO DISMISS COMPLAINT DUE TO
THE NATIONAL LABOR RELATIONS BOARD'S
LACK OF A PROPER QUORUM (359 NLRB NO. 113)

Pursuant to Sections 102.47 and 102.48(d)(1) of the Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Respondent Bloomingdale's, Inc. respectfully moves for reconsideration of the Board's "Order Denying Motion," *Bloomingdale's, Inc. and Fatemeh Johnmohammadi*, 359 NLRB No. 113 (April 30, 2013). This Order, issued by Chairman Mark Gaston Pearce, Richard F. Griffin, Jr., and Sharon Block, ruled on Respondent's "Motion to Dismiss the Complaint Due to the National Labor Relations Board's Lack of a Proper Quorum," which was filed on March 1, 2013. At the time the Board's Order was issued, the United States Supreme Court had not yet decided the case of *National Labor Relations Board v. Noel Canning*, 134 S.Ct. 2550 (2014). Now, given the Supreme Court's landmark decision in *Noel Canning*, it is clear that the Board's Order should be vacated, and Respondent's Motion to Dismiss should be reconsidered.

In light of *Noel Canning*, Respondent respectfully submits that this case—upon reconsideration—should be dismissed because: (a) two invalidly appointed Board Members, Richard F. Griffin, Jr. and Sharon Block, ruled on Respondent’s motion to dismiss the proceedings for lack of a valid quorum; (b) the Complaint against Respondent was issued by the Regional Director of Region 31, Mori Pam Rubin, whose appointment was invalid since the Board lacked a valid quorum to approve her appointment; and (c) the Board and its Acting General Counsel lacked authority to prosecute this case during the time the Board lacked a valid quorum.

I. THE BOARD’S ORDER SHOULD BE VACATED

The Order consists of only five paragraphs. In the second paragraph, the Board specifically acknowledges that “Respondent contends that under the Act, all actions of the Board, including those of its appointees, agents, and delegates, are void ab initio when the Board acts in the absence of three validly appointed members.” This confirms the breadth of Respondent’s position, which is not limited to a contention that actions taken directly by the quorum-less Board are invalid. Other actions taken by “appointees, agents and delegates” also may well be invalid, such as the actions of a Regional Director whose appointment was not approved by a valid quorum of the Board. Also, as discussed below, the valid prosecution of an unfair labor practice complaint requires a validly constituted Board to take actions which the Board is required to take in accordance with the Board’s own Rules and Regulations. For example, under Rule 102.24(b), the Board is required to rule on pre-hearing motions for summary judgment or dismissal. In this very case, Respondent submitted its motion to dismiss due to the lack of a proper quorum. However, because the Board did not have a proper quorum,

Respondent's motion was decided by three Board Members, two of which were in fact invalidly appointed and yet ruled on the validity of their own appointments to the Board.

The third paragraph addresses the power of the Acting General Counsel to investigate and prosecute charges of unfair labor practices in the absence of a Board quorum. The Order declares that the "authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any 'power delegated' by the Board, but rather directly from the language of the NLRA." However, the Order does not consider that the Complaint in this case was issued by a Regional Director whose appointment had not been approved by a Board with a valid quorum. Regional Director Rubin issued the Complaint, not the Acting General Counsel. The Complaint recites in its opening paragraph that it "is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (the Act), and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board)" Section 102.15 states that "[a]fter a charge has been filed, if it appears to the *Regional Director* that formal proceedings in respect thereto should be instituted, *he* shall issue and cause to be served on all parties a formal complaint in the name of the Board stating the unfair labor practices" (Emphasis added.)

As explained in an article in Law360 entitled "*Noel Canning Ruling Casts Doubt on Regional Directors*," dated June 27, 2014:

While it is the NLRB general counsel that has authority to issue complaints under the National Labor Relations Act, the general counsel generally delegates that authority to the regional directors who investigate and issue complaints, explained Ronald Meisburg, former NLRB member and general counsel and current co-head of Proskauer Rose LLP's labor-management relations practice.

Historically, about 90 percent of unfair labor practice [charges] are handled completely at the regional level, he added.

“It’s the general counsel in whose name the complaints are issued, but the regional directors do that under a delegation of authority,” Meisburg said. “Regional directors have a fair amount of autonomy, subject to guidance and approvals received from the general counsel’s office at the NLRB’s Washington, D.C. headquarters.”

(p. 2)

Of course, the issue here is not whether the General Counsel can delegate authority to issue complaints to Regional Directors in general; rather, the issue is that Regional Director Rubin was not a properly appointed Regional Director who was approved by a validly constituted Board to serve as a Regional Director. In this case, the problem arises from the Board’s lack of a quorum and consequent inability to approve new Regional Directors.

This is not a case where the now-nullified Board appointments had no impact on the proceedings. Respondent was denied due process in this case by the direct actions of two Board Members who ruled on the motion to dismiss, and by the direct actions of a Regional Director who had not been validly approved by the Board. Clearly, the Board’s Order should be vacated.

II. THE PROCEEDINGS IN THIS CASE ARE NULL AND VOID BECAUSE THE COMPLAINT WAS ISSUED BY THE REGIONAL DIRECTOR OF REGION 31, WHOSE APPOINTMENT WAS NOT APPROVED BY A VALID QUORUM OF THE BOARD

On May 23, 2012, the Board announced the appointment of Mori Pam Rubin as Regional Director of Region 31 of the Board in Los Angeles, California. At the time of her appointment, the Members of the Board were Mark Pearce, Brian Hayes, Richard Griffin, Sharon Block and Terrence Flynn. Member Pearce had been appointed to the Board on April 7, 2010, and Member Hayes had been appointed on June 29, 2010. The Senate was in session at the time both Member Pearce and Member Hayes were appointed, and their appointments were confirmed by the Senate. However, Members Griffin, Block and Flynn were appointed on January 4, 2012,

when the Senate was not in session. In *Noel Canning*, the Supreme Court determined these three Members were invalid recess appointees because the Senate was not in “recess” within the meaning of the Constitution at the time the President made the appointments. Because they were invalid recess appointees, the Board did not have a valid quorum of three members, as required by the Supreme Court’s earlier decision in *New Process Steel L.P. v. National Labor Relations Board*, 130 S.Ct. 2635 (2010).

It has long been the rule that the appointment of Regional Directors by the Board’s General Counsel must be approved by the Board. Thus, the NLRB Delegation of Authority and Assigned Responsibilities of the General Counsel states that “[t]he appointment . . . of any Regional Director . . . shall be made by the General Counsel *only upon the approval of the [B]oard*.” 77 FR 45696 (amendment to 20 FR 2175) (emphasis added). However, in the case of Regional Director Rubin, the Board could not validly approve her appointment on or about May 23, 2012 since the Board did not have a valid quorum.

In the present case, Regional Director Rubin issued the Complaint and Notice of Hearing on October 31, 2012. This followed an investigation conducted by Region 31, during which Respondent submitted three detailed position statements to the Regional Office. During this investigation and in its Answer to the Complaint, Respondent consistently contended that the proceedings in this case were invalid due to the Board’s lack of a proper quorum. Consequently, it is apparent that this case must be dismissed because the Complaint issued by Regional Director Rubin is null and void. See *Hooks ex rel. NLRB v. Kitsap Tenant Support Services, Inc.*, No. C13-5470 BHS, 2013 US.Dist.LEXIS 114320 (W.D. Wash. Aug. 13, 2013).

III. THE PROCEEDINGS IN THIS CASE ARE NULL AND VOID BECAUSE THE BOARD AND THE ACTING GENERAL COUNSEL LACKED AUTHORITY TO PROSECUTE THIS CASE DURING TIME PERIODS WHEN THE BOARD LACKED A VALID QUORUM

As a reading of the Board's Rules and Regulations makes clear, the Board may play an active role in the processing of an unfair labor practice complaint even before the case is transferred to the Board following the Administrative Law Judge's decision and recommended order. By way of example:

- The Board rules on all motions for summary judgment and for dismissal prior to the hearing. (Section 102.24)
- The Board rules on requests by parties for special permission to appeal from rulings of the Regional Director or Administrative Law Judge. (Section 102.26)
- The Board reviews decisions by Administrative Law Judges to dismiss an entire complaint. (Section 102.27)
- The Board may issue subpoenas and may rule on petitions to revoke subpoenas. (Section 102.31)
- The Board may decide a case directly upon an approved stipulation of facts. (Section 102.35)
- The Board, to effectuate the purposes of the Act, may at any time order that a case be transferred to and continued before it. (Section 102.50)

Because of the Board's actual or potential involvement in an unfair labor practice case from the time a complaint is issued until the case is decided by the Administrative Law Judge and transferred to the Board, it is apparent that the issuance of a complaint by a Regional Director or the prosecution of a case by the General Counsel while the Board does not have a valid quorum raises serious due process issues. For example, motions for summary judgment or

dismissal cannot be heard and ruled upon, and rulings by the Administrative Law Judge cannot be appealed.

It would seem that fundamental concepts of due process demand that the forum in which a defendant is being prosecuted be fully functional, and a Board without a valid quorum is not fully functional. This is arguably a matter of *jurisdiction*. See *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3rd Cir. 2013), *reh'g granted*, 2014 U.S.App.LEXIS 15360 (3rd Cir. 2014).

Respondent is aware of the Board's actions taken on July 18, 2014 in an attempt to "confirm, adopt and ratify *nunc pro tunc* all administrative, personnel, and procurement matters approved by the Board or taken by or on behalf of the Board from January 4, 2012 to August 5, 2013, inclusive" as set forth in the Minute of Board Action. Respondent also is aware that the Board expressly authorized "[t]he selection of Mori Rubin as Regional Director for Region 31 (Los Angeles)," as reflected in the same Minute of Board Action. However, to the extent the Minute of Board Action is intended to ratify actions taken by Regional Director Rubin prior to July 18, 2014, as distinguished from actions taken after that date, Respondent respectfully contends that the Board has no jurisdiction to take such action. The doctrine of ratification is rooted in agency law, and the principal (here, the Board) cannot ratify the acts of the agent (here, the Regional Director) if the principal lacked authority to do such acts at the time of the ratification (here, the quorum-less Board had no authority). See RESTATEMENT (SECOND) OF AGENCY, § 84(2) (1957). In this case, Regional Director Rubin had no authority to investigate the Charging Party's unfair labor practice charge, or issue the Complaint against Respondent, and this conclusion cannot be changed *nunc pro tunc* by the Minute of Board Action. See *Hooks, supra*, 2013 US.Dist.LEXIS 114320 (Complaint could not be ratified because Board did

not have a valid quorum, and Acting General Counsel Lafe E. Solomon also was not validly appointed); see also *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-73 (D.C. Cir. 2009) (A Board delegation cannot survive the loss of a quorum on the Board).¹

Moreover, Regional Director Rubin cannot be considered a *de facto* Regional Director even if the *de facto* officer doctrine were applicable to this situation (which Respondent does not concede). At the time of Regional Director Rubin's appointment and at the time when she issued the Complaint against Respondent, the possible invalidity of the recess appointments of Members Griffin, Block and Flynn, the impact of the constitutionally infirm appointments on the Board's quorum, and the ability of the Board to act were well known to the agency. Moreover, in Respondent's position statements, Answer to Complaint, and other documents, Respondent repeatedly asserted it was not waiving its position that the Board lacked a valid quorum. Respondent even filed a pre-trial "Motion to Dismiss the Complaint Due to the National Labor Relations Board's Lack of a Proper Quorum," in which Respondent asserted that because the Board did not have a valid quorum, "the Board's agents and delegates lack authority on behalf of the Board." Thus, the exception to the *de facto* doctrine set forth in *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984) would appear to be applicable since (1) the challenge was brought at or around the time of the challenged government action, and (2) the agency involved had reasonable notice of the claimed defect in the officer's authority. Moreover, as noted in the Fifth Circuit's decision in *D.R. Horton, Incorporated v. National Labor Relations Board*, 737 F.3d 344, *16 (5th Cir. 2013), "the *de facto* officer doctrine generally is inapplicable to a timely

¹ Respondent is also aware of the Board's decision in *Pallet Companies, Inc.*, 361 NLRB No. 33 (Aug. 27, 2014), but respectfully disagrees with the decision. Respondent contends that the Regional Director, not the General Counsel, issued the complaint in this case, and that any purported delegation of authority to issue complaints to an invalidly appointed Regional Director is null and void.

constitutional challenge to the appointment of an officer” [citing *Ryder v. United States*, 515 U.S. 177, 182-183 (1995)]. Here, Respondent timely challenged the constitutional validity of the appointments of Members Griffin, Block and Flynn and the appointments of agents and delegates by the Board during their tenure.

IV. CONCLUSION

The Board’s Order denying Respondent’s Motion to Dismiss cannot simply be ratified by the current Board since it is clearly contrary to the Supreme Court’s decision in *Noel Canning*. The Order should be vacated, and then Respondent’s Motion to Dismiss should be reconsidered in light of *Noel Canning*. Upon reconsideration, the Motion to Dismiss should be granted. It should be granted because the Complaint is invalid in that it was issued by a Regional Director who had no authority to issue it. Moreover, all proceedings taken in this case are also invalid because of the Board’s lack of a valid quorum until new Board Members were appointed and confirmed by the Senate. Respondent has been denied due process as a result of being served with an invalid Complaint and prosecuted by a quorum-less Board.

Dated: October 9, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action; my business address is Jackson Lewis LLP, 801 K Street, Suite 2300, Sacramento, California 95814.

On October 9, 2014, I served the within:

**BLOOMINGDALE'S, INC.'S MOTION FOR RECONSIDERATION OF
BOARD'S ORDER DENYING MOTION TO DISMISS COMPLAINT DUE TO
THE NATIONAL LABOR RELATIONS BOARD'S LACK OF A PROPER
QUORUM (359 NLRB NO. 113)**

on the parties and interested persons in said proceeding:

X by forwarding a true and correct copy thereof electronically from e-mail address baumg@jacksonlewis.com between approximately 4:45 p.m. and 5:00 p.m. to the persons at the e-mail addresses set forth below.

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Additionally, on October 9, 2014, I will electronically file the above-mentioned document with the Office of the Executive Secretary.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed on this 9th day of October, 2014 at Sacramento, California.


Gail Kristine Baum